



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
SUCCESSION CAUSE 336 & 337 OF 1994
In The Matter of the Estate of Githaiga s/o Wanjoga
Alias Daniel Githaiga Wanjoga(Deceased)

MARY WAIRIMU GITHAIGA.....PETITIONER/APPLICANT

Versus

MARGARET WANJIKU WATHUKU.....RESPONDENT

SUCCESSION CAUSE NO. 337 OF 1994

In The Matter of the Estate of Wanjoga Macheru(Deceased)

MARY WAIRIMU GITHAIGAPETITIONER/APPLICANT

Versus

MARGARET WANJIKU WATHUKU.....RESPONDENT

RULING

In the application by way of Summons (General Form) dated 17th August, 2004, the Applicant, Mary Wairimu Githaiga, is seeking orders:

“(a) That the court authorises its Executive officer to execute mutation forms, transfer documents or any other documents on behalf of the Respondent, in order to complete the process of the distribution of the estate of the deceased, GITHAIGA WANJOGA alias DANIEL GITHAIGA WANJOGA, in terms of the Certificate of Confirmation of Grant issued on 7th December 1998.”

The Summons (General Form) is filed under Rule 73 of the Probate and Administration Rules giving the Court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

That Summons is filed in this Court's Succession Cause No. 336 of 1994. But as can be seen in the proceedings dated 28th October, 2004, there is a similar Summons in this Court's Succession Cause No. 337 of 1994 where the deceased owner of the estate in that Succession Cause is WANJOGA MACHERU. In each of the two Succession Causes, the Applicant is the same Mary Wairimu Githaiga and the Respondent is the same Margaret Wanjiku Wathuku. The certificate of confirmation of Grant in each succession cause was issued on 7th December, 1998 to Mary Wairimu Githaiga as the administrator, intestate, of the estate of the deceased person in that succession cause. In each succession cause the only two beneficiaries were Mary Wairimu Githaiga and Margaret Wanjiku Wathuku. The only other difference, apart from the person of the deceased, is that in Succession cause No. 336 of 1994, the parcel of land involved is **GITHI/MUTHAMBI/222** while in Succession Cause No. 337 of 1994, the parcel of land involved is **GITHI/MUTHAMBI/327**.

I consolidated the two succession causes for the purpose of hearing the two applications only. **The Applicant, Mary Wairimu Githaiga, has now brought copies of land registers of the parcels of land the Applicant wishes to deal with as mentioned in the applications. Although She had not cared and did not intend to bring those copies, I had to send her to the Land Registrar to obtain the copies because I suspected that since the certificates of confirmation of grant were obtained in the year 1998, by now those certificates may have been registered at the Land Registry and I therefore wanted to see the position of the relevant land registers today before proceeding to decide the application before me.**

This is because it was the Certificate of Confirmation of Grant which was supposed to be registered at the land registry by the Land Registrar in each of the two succession causes and that meant that in each cause,

MARY WAIRIMU GITHAIGA

AND

MARGARET WANJIKU WATHUKU

were to be registered together as proprietors in common in equal undivided shares and that therefore there was no question of the signing of Mutation Forms which the Applicant, Mary Wairimu Githaiga is talking about in her applications before me dated 17th August 2004 in these two succession causes.

Mutation Forms and or transfer forms would come in only in the event of the registered co-owners of the land wishing to partition or to sub-divide the land either to share out separate titles between themselves or to transfer a portion of the land to a third party or to third parties. Those being transactions subsequent to the registration of the certificate of Confirmation of Grant whereby the two beneficiaries became co-owners or co-proprietors or proprietors in common, the transaction to partition or the transaction to sub-divide the land and transfer a portion to a third party or third parties are not covered by the court order as expressed in the certificate of Confirmation of Grant.

Those transactions, that is the partition or sub-division and transfer in question will entirely be covered by provisions of the Registered Land Act which give the Land Registrar sufficient power and legal authority to effect the transactions without seeking the assistance of a court order.

If parties have to come to the court in a dispute emanating from those transactions therefore, the parties will have to come by way of a pure civil suit under the Civil Procedure Act separate from and outside these two succession causes and also outside provisions of the Law of Succession Act.

From the two copies of the land registers, which the Applicant has brought, one for parcel of land GITHI/MUTHAMBI/222 and the other for GITHI/MUTHAMBI/327, my suspicion has been confirmed. Each Certificate of Confirmation of Grant was registered by the Land Registrar on the relevant land register on 11th August 1999. By that registration, the process of the distribution of the deceased's estate in each Succession Cause was completed in relation to the affected parcel of land in terms of the relevant certificate of Confirmation of Grant. None of those certificates included an order for partition or sub-division and indeed in the circumstances of this case, it would have been unwise for the court to have included orders to that extent. The parties should now go to the Land Registrar for partition or sub-division and transfer just like any other land owner who has nothing to do with succession proceedings.

In other words, distribution in relation to the two affected parcels of land having been completed by the fact of the Applicant and the respondent becoming Co-owners or Co-proprietors or Proprietors in common, the administration of the estate of the Deceased by the Applicant as the Deceased's personal representative in relation to the affected two parcels of land came to an end. What remained between the two ladies was co-ownership or co-proprietorship or proprietorship in common of each of the two parcels of land and that is the legal relationship under which the two ladies have to move in order to partition or sub-divide any of those two parcels of land and the Registered Land Act had made adequate provisions for such transactions to take place.

But even if the certificate of confirmation of Grant had included orders to partition or to sub-divide and transfer, would the Applicant have obtained the orders she is asking for? I have held in some other succession causes and I repeat here that such orders are not properly available from court in succession causes, if the orders are aimed at exercising the powers and performing the duties of a personal representative.

That is so because succession proceedings are specialized proceedings entirely governed by the Law of Succession Act and its rules and should not be treated like ordinary civil suits where the Civil Procedure Act and its rules govern the proceedings.

Under the Law of Succession Act once a person has been granted letters of administration or granted probate following the specialized proceedings, he becomes the administrator or executor with powers given to him and duties imposed upon him, under Sections 82 and 83 of the Law of Succession Act, as a personal representative of the deceased person whose estate that personal representative is administering or executing. The Law of Succession Act and its rules make no provisions for anybody else other than the personal representative to assume those powers and perform those duties and therefore for the court to make an order authorising somebody else to exercise the powers and discharge the duties of a personal representative, the court would be acting outside provisions of the Law of Succession Act and the order so made will not be legally tenable.

It should not be forgotten that provisions of the Law of Succession Act have ousted provisions of the Civil Procedure Act with the exception of those that are specifically mentioned by provisions of the Law of Succession Act as applicable in Succession proceedings. I am not aware of any provisions of the Civil Procedure Act made so applicable in relation to the exercise of the powers and the performance of the duties of a personal representative under Sections 82 and 83 of the Law of Succession Act.

In these applications, however, Margaret Wanjiku Wathuku was a mere beneficiary. She was not a personal representative. As such the Applicant, as a personal representative of the deceased, clothed with authority under *Section 82* of the Law of Succession Act, and not anyone without that cloth, had power, in appropriate situation, to deal with the dispute within the provisions of the Law of Succession Act. Having brought the applications under *Rule 73* of the Probate and Administration Rules, it appears the Applicant would have been entitled to the orders sought.

But as I said earlier, no orders for partition or sub-division and transfer were included in the certificates of confirmation of grant. Orders in those certificates have already been executed and

the process of distribution in terms of those orders completed. These applications must therefore fail.

Accordingly, each one of the two applications is hereby dismissed. No order as to costs.

Dated this 11th day of November 2004.

J. M. KHAMONI

JUDGE